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In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE VALLEY INDUSTRY AND COMMERCE ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This brief amicus curiae of the Valley Industry and Commerce Association in support of the Petition for Writ of Certiorari sought by Petitioners in this case is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for all parties.

INTEREST OF AMICUS CURIAE

The Valley Industry and Commerce Association ("VICA") is a non-profit public benefit corporation established to advance and promote a positive socio-economic and a balanced physical environment in the northern portion of Los Angeles and Ventura Counties. VICA's over 300 members include many of the country's leading corporations in fields ranging from health care to aerospace, manufacturing to finance, and employ more than 90,000 people in the Greater San Fernando Valley and its surrounding communities. Since 1949, VICA has served to articulate business' agenda to elected officials and the public in an effort to retain and attract jobs, and to encourage the economic vitality of the region.

It is the goal of VICA to enhance its constituent areas' attractiveness as both a dynamic industrial and commercial region as well as a desirable place to work and live. VICA, through its Board of Directors, and specifically its Land Use Committee, is actively involved in general policy issues affecting land use planning, and associated development regulations, including exactions and development fees.

As amicus curiae, VICA seeks to augment the argument in the Petition for Writ of Certiorari. VICA believes that its public policy perspective and collective experience in support of private property rights and their relationship to a healthy economic environment will provide an additional viewpoint with respect to the constitutional issues presented. The City of Los Angeles, as well as many other southern California municipalities and local agencies, have adopted, or are considering the adoption of, development linkage fees similar to those at issue in this case. As a result, VICA believes it is in the best interest of all affect parties to have clear direction

from this Honorable Court as to the appropriateness and legality of these types of exactions.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

It is important for the Court to be aware that the matters at issue in this case affect not only developers and property owners, but the entire business community. VICA's primary purpose in filing this brief is to provide the Court with some perspective as to how the "nexus" requirement for development exactions, as established in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), has been grossly abused by state and local governments, and misinterpreted by the court below, with a resulting negative impact on commerce.

As traditional sources of revenue have dried up, local governments have increasingly turned to fees on new construction as a means of closing the budgetary gap. However, the proliferation of development or "linkage" fees, which shifts the tax burden from the general population to the construction and development industry, has had a chilling effect on the entire economy of our region. A recent study, commissioned by VICA and conducted under the auspices of the UCLA Graduate School of Management, confirmed that new regulations on development, including specifically escalating requirements for development fees and other exactions, are a primary reason that companies in this region have postponed or canceled plans for further growth and expansion.[1]

Based on the broad "nexus" analysis condoned by the court below, the development of real property can be theoretically linked to the need for almost any program of state or local government, and virtually any development fee can be justified through an elaborate "cause and effect" analysis. Too often, however, this "analysis" represents nothing more than a

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[1] *See* Valley Industry and Commerce Association, "Business Study of the San Fernando Valley," UCLA Anderson Graduate School of Management, May 7, 1991.

post-hoc rationalization. In a nutshell, the argument is as follows: people need services, commerce allegedly creates those needs, and property developers (generally viewed as a politically unpopular group) pay the bill; the whole scenario constitutionally blessed under the guise of the *Nollan* "nexus" test.

For example, the City of Los Angeles has prepared a "nexus" study and will soon adopt a low-income housing linkage fee, similar to the one at issue in this case, but with the fee at a level *five to ten times greater* than that charged in Sacramento. Los Angeles already has an "Art Development Fee"[2] which requires a payment of one percent of all commercial construction costs to the City for art and cultural programs.

The decision below opens a Pandora's Box of possibilities for further abuse of the *Nollan* "nexus" requirement. In many large urban areas, including Los Angeles, residents of lower income neighborhoods often do not have the same access to supermarkets, shopping centers and entertainment establishments (e.g. movie theaters) as do residents of other areas of the City, and it has been suggested by some that the government should require developers in downtown areas or more affluent neighborhoods to pay for (or build and operate) supermarkets in low income areas. Obviously, such a requirement would be far adrift from the dictates of this Court in *Nollan*. Yet, the Ninth Circuit clearly leads us in this exact direction.

The already typical scenario is as follows. An existing but unfunded need is identified. A study is then commissioned by the local government to establish the required "nexus."[3]

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[2] City of Los Angeles Ordinance No. 166,724

[3] Interestingly, an unintended side effect of *Nollan* has been to spawn a cottage industry of consultants to produce the justifying "nexus" studies. As in Sacramento, virtually every linkage fee involves the hiring by the local government of outside consultants, charging tens to hundreds of thousands of dollars, to conduct the required "nexus" analysis. Not surprisingly, we are unaware of any locality every having paid for such a study only to have the study result in a finding that no "nexus" existed.

With "nexus" study in hand, the locality feels free to adopt a fee on development. The only thing left is for the government to set the amount of the fee, which is largely a political decision. Often the fee is set at an amount high enough to serve its purposes but low enough to make a legal challenge by the affected parties uneconomical. The entire process is rife with abuse, and too often the government crosses over that thin line between a legal exaction and an "out-and-out extortion." *See Nollan,* 483 U.S. at 837.

Among the clearest examples of abuse of the *Nollan* requirements comes from the findings used by the City of Culver City, California, to establish an alleged "nexus" for its "Arts in Public Places" development fee. Those findings state, in part:

> (c) As development and revitalization of real property within the City continues, the opportunity for creation of cultural and artistic resources is diminished.
>
> (d) As this development and revitalization continues as a result of market forces, urbanization of the community results.
>
> (e) As these opportunities are diminished and this urbanization occurs, the need to develop alternative sources for cultural and artistic outlets to improve the environment, image and character of the community is increased.
>
> (f) Development of cultural and artistic assets should be financed by those whose development and revitalization diminishes the availability of the community's resources for those opportunities and contributes to community urbanization.[4]

To say that such findings fall short of the constitutional "nexus" requirement would be an understatement. Yet that is how one city justifies charging all development a one percent fee for public art projects. Without further direction from this Court, this result will likely be duplicated by states and local governments across the country.

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[4] *See* City of Culver City Ordinance No. 88-019.

CONCLUSION

This case provides a timely and important opportunity for this Court to further delineate the constitutional requirements of the "nexus" test set forth in *Nollan*. To allow the decision below to stand would condone the practice of allowing meaningless and pretextual "nexus" studies to replace important constitutional protections. Until business and government play by the same set of constitutional rules, the ability of our economy to grow and compete will continue to be seriously hampered. VICA respectfully requests that this Court grant a Writ of Certiorari in this case.

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